

# The Direct Justiciability of the Right to Health at the IACtHR

## What is the Added Value?

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In a previous [post](#), Lucas Sánchez discussed how the Inter-American Court of Human Rights (IACtHR) recently found, for the first time, a direct violation of the right to health in the case of [Poblete Vilches vs. Chile](#). His post examines the shift from an indirect towards a direct justiciability regarding the violation of Economic, Social and Cultural Rights (ESC Rights) established in [Article 26 of the American Convention on Human Rights \(ACHR\)](#). This shift had already been asserted in 2017, in the [ruling of the Lagos del Campo vs Peru](#) case, with regards to the right to work.

As a follow-up, in this contribution I will briefly discuss how this shift has taken place regarding the right to health in particular. I then argue that the direct approach opens up new possibilities for the role of national courts in the future. Namely, the direct approach can allow for dealing with more specific features of the right to health as it has been construed at the international level, something which is not so readily available through the indirect approach. Finally, I reflect on some of the pending questions and possible risks related to the IACtHR's interpretation of the scope of the right to health.

### ***The IACtHR's Framing of Healthcare Services as a Human Rights Issue***

In general terms, the case of *Poblete Vilches vs Chile* concerns the obligations of states with regards to, *inter alia*, the rights of patients –and their families- when resorting to healthcare services. Particularly, the issues of informed consent and obligations to provide access to quality healthcare were at stake.

A brief overlook of the facts of the case: Mr. Vinicio Antonio Poblete Vilches, who was an elderly man at the moment, was admitted to a public hospital in Chile (“Hospital Sótero del Río”) on two consecutive occasions. On his first visit, Mr Poblete Vilches was subjected to surgery without prior consent, and was discharged afterwards ([paras. 43-50](#)). It was established, through expert testimony and the clinical records, that the decision to perform surgery on Mr Poblete and then release him was erroneous. During a second stay in the same public hospital, Mr Poblete Vilches suffered a series of ill treatment and misdiagnoses ([paras. 52-54](#)). Eventually, Mr Poblete Vilches passed away, and the hospital personnel refused to perform an autopsy ([paras. 55-58](#)).

In its reasoning, the IACtHR referred to the distinction between obligations of progressive vs immediate fulfillment within the right to health. In [Acevedo Buendía and others vs Peru](#), the Court had established that the ‘progressive’ element of

ESC rights in general, as foreseen in Article 26 ACHR, should not be understood as a justification for indefinite delays in their fulfillment. Consequently, in accordance with Article 1.1 ACHR, human rights obligations with a 'progressive' nature also fall within the jurisdiction of the Court. This reasoning was reiterated in *Poblete Vilches vs Chile* ([para. 104](#)). However, the Court did not declare a general violation of the progressive element of the right to health, as the Chilean State had demonstrated the expansion of healthcare services in the country ([para. 134](#)).

Instead, in *Poblete Vilches vs Chile* the Court declared a violation of the obligations under Article 26 ACHR which need to be fulfilled immediately, and not progressively. In the case of the right to health, this includes the obligation to provide emergency medical services to the population ([para. 124](#)). The Court interpreted the result of the medical malpractice at hand ([paras. 136-143](#)) as part and parcel of the Chilean state's general obligations to provide access to quality healthcare services to the nation's population ([paras. 118-119](#)). In so far as the conditions of the public hospital in question were subpar ([para. 138](#)), Mr Poblete Vilches' demise was seen as the result, among other things, of an unresponsive healthcare system ([para. 142](#)).

As for the shift in the Court's previous interpretations, the IACtHR had previously dealt with cases of medical malpractice and overall lackluster healthcare services. Obligations in terms of supervision and accountability had already been asserted in the context of surgical interventions, such as in *Alban Cornejo vs Ecuador* and *Suarez Peralta vs Ecuador*. In turn, non-surgical issues related to the treatment of mental health patients were at the core in *Ximenes Lopes v Brazil*. In these previous cases, and partly due to the statutory limitations in Article 19.6 of the "San Salvador Protocol", health-related matters were rather addressed as violations of the right to life (Article 4, ACHR), to personal integrity (Article 5.1, ACHR), and to a fair trial and effective judicial protection (Articles 8 and 25.1 ACHR).

In *Albán Cornejo vs Ecuador*, there was consensus within the IACtHR that the right to health was not directly justiciable, and this was also explicitly stated in a [separate opinion](#) by then-judge Sergio García Ramírez. Afterwards, in his [concurrent opinion of 2013](#) in *Suárez Peralta vs Ecuador*, the judge and current President of the IACtHR, Eduardo Ferrer MacGregor, advocated for establishing a direct violation to the right to health stemming from the interpretation of Article 26 ACHR. Now, in *Poblete Vilches vs Chile*, this individual opinion turned into the majority's view – albeit with some skepticism expressed in a concurring opinion by Judge Humberto Antonio Sierra Porto. As a result, the State of Chile was condemned for human rights violations because, among other things, it did not provide a healthcare service fulfilling minimum conditions required by the right to health, which include criteria for reducing the incidence of medical error ([paras. 174-176](#)). As Chile has not ratified the "San Salvador" Protocol, disclaimers used in previous case law were not introduced in this ruling.

### ***Which Added Value? New Avenues for the Right to Health After Poblete Vilches***

Claiming a direct violation of the right to health provides opportunities for courts to engage in the [current debates](#) about access to, and quality of healthcare services.

First, the direct justiciability of the right to health in particular, and of ESC rights in general, provides an enhanced discursive weight. The possibility to invoke them in a particular litigation strengthens the understanding that ESC rights have autonomous value in terms of access to justice. They are no longer simply a “derivate” of the civil and political counterparts. This shift in understanding should not be underestimated because, even though the Cold War scenario, in which the division of these two groups of rights originally emerged, has technically ended, their conceptual separation continues to this day. A move towards direct justiciability contributes to overcoming this outdated ideological divide, whilst providing a broader set of arguments for human rights lawyers.

Second, direct justiciability of the right to health opens the door to more complex assessments of its technical components. A health-centered approach can allow courts to resort to input from the community of medical and public health experts. Non-binding instruments from international quasi-judicial bodies, such as [General Comment No. 14](#) of the Committee on Economic, Social and Cultural Rights, for example, have provided more detailed indications on what the right to health *should* include. Resorting to these specialized documents may serve as further guidance for national decision-makers on how to fulfill their human rights obligations. Given how Mr Vinicio Poblete Vilches was the subject of medical malpractice, the interplay between structural problems of access and of quality of health services requires a more nuanced understanding of each of these dimensions. Although this is not developed with more detail in the IACtHR’s ruling, future cases on this matter could go deeper into the subject. If and when a Court chooses to issue structural remedies in the area, more detailed insights about the core problems of healthcare services, both from a national and an international perspective, will be essential.

### ***The Right to Health After Poblete Vilches: Promises and Perils Ahead***

The cross-cutting dimension of the right to health makes it difficult, if not impossible, to isolate it from the wider economic and political context. The organization of the healthcare sector is dependent on economic reasoning and political will. The necessary structural reforms across Latin American countries inevitably require rallying policymakers, legislatures and regulatory bodies towards the attainment of the objectives of the right to health. This is certainly no easy task, as there is still no unified vision on the matter.

Nonetheless, the positive aspects of establishing a direct violation of the right to health can be seen as a step forward in taking ESC rights more seriously. There is a gradual trend of moving away from a programmatic vision and more towards direct justiciability. The IACtHR’s ruling is, at the very least, a move towards overcoming the mostly artificial, though not entirely meaningless, Cold War division between civil and political rights on the one hand and ESC rights on the other.

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